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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-207

APPALACHIAN POWER COMPANY,
Appellant,

v.

THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF APPEALS
OF THE STATE OF WEST VIRGINIA

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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October 7, 1975

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Introduction

Appalachian Power Company ("Appellant" or "Appalachian") submitted its Jurisdictional Statement in this matter to the Court on August 8, 1975. Appellee's Motion to Dismiss or Affirm, filed on September 30, 1975, introduces irrelevant materials and attempts to rehabilitate the wholly inadequate state procedure by speculating upon the inarticulated rationale relied upon by the Supreme Court of Appeals of West Virginia. At no place does Appellee deny that Appalachian's practice, which became effective October 1, 1974 of requiring all customers to install at their own expense the service entrance cable, was consistent with

Appalachian's tariff filed with the Commission and previously approved by the Commission. The Commission's suggestion that the hearing of March 7, 1975, provided Appalachian with notice and opportunity to be heard sufficient to satisfy the procedural due process requirements of the Fourteenth Amendment of the United States Constitution would, if accepted by this Court, reduce such requirements to a sham.

In this Brief, Appalachian will first consider several factual matters raised by Appellee which are not germane to this proceeding. We will then review the arguments raised by Appellee in support of its Motion to Dismiss or Affirm.

Preliminary Matters

The Commission emphasizes that Appalachian's change in its service entrance cable policy as of October 1, 1974 did not result in Appalachian's initiating the practice of *charging* for these service connections. The Commission argues that its order of March 6, 1975 could not apply to any service entrance cable charges imposed beginning October 1, 1974, because Appalachian made no such charges. Appellee then states at p. 7 of its Motion to Dismiss or Affirm that it is unclear "exactly what Appalachian is complaining of in this proceeding."*

This is pure camouflage. The Commission knows full well what Appalachian is complaining about. Appalachian absorbed the cost of installing these service entrance cables prior to October 1, 1974. Subsequent to October 1, 1974 Appalachian, in accordance with an option clearly set forth in its tariff on file with and approved by the Commission,

* Appellee ignores the ordering paragraph in its Order dated March 6, 1975: "It is further Ordered that Appalachian Power Company shall forthwith refund any of such charges already paid by its customers for such unapproved practices since October 1, 1974." The Order by its own terms does not limit such refunds to charges paid to Appalachian.

chose not to absorb such cost. Thus, after October 1, 1974, the customers who wanted the service connection were required to install the entrance cable at their own expense. The Commission's cease and desist order of March 6, 1975 directed Appalachian to absorb this cost once again. That order, therefore, directly and adversely affected Appalachian and that order was issued without notice to Appalachian or opportunity to be heard. This is what Appalachian is complaining about.

Appellee raises another irrelevancy by constantly referring to a different service practice change which occurred on February 10, 1975. Appellant has never objected to the procedure followed by the Commission in its consideration of the February 10, 1975 service practice change. If Appellee had followed a similar procedure with respect to the October 1, 1974 service practice change this appeal probably would have been unnecessary. In fact, the hearing of March 7, 1975 was in part scheduled for the very purpose of hearing testimony on the February 10, 1975 change. While Appalachian came prepared to present evidence on that matter, it certainly did not anticipate that the Commission would be awaiting its arrival with an order (predating the hearing) concerning the October 1, 1974 service practice change.

Appellant makes no response to the statement that the order relating to the February 10, 1975 change is moot other than that the issue was never raised. We turn now to the substantive arguments raised by Appellee in its Motion to Dismiss or Affirm.

ARGUMENT

I.

The Decision of the Supreme Court of Appeals of West Virginia Does Not Rest On Adequate Non-federal Grounds.

The Commission argues that the decision of the Supreme Court of Appeals of West Virginia rests on adequate non-federal grounds (Motion to Dismiss or Affirm, pp. 12-14). In support of this contention, the Commission cites several statutory provisions which give the Commission general control over the facilities, charges and services of public service corporations.

It is fundamental that the Opinion of the Supreme Court of Appeals of West Virginia contains no articulated rationale—state or federal—for its decision.* Moreover, nowhere in the language of the statutory provisions cited by the Commission in its Motion of Dismiss or Affirm may one find anything which may be said clearly to cover the situation at issue. Where the Supreme Court is unable to discover an adequate non-federal ground in support of the state court judgment "it will be presumed that the State court based its judgment on the law raising the Federal question, and this court will then take jurisdiction." *Klinger* v. *Missouri*, 80 U.S. 257, 263 (1871).**

*See Jurisdictional Statement, App., p. 3a.

**At best in this case there is an ambiguity as to the likely grounds of the state court's decision. In such cases, the Court has remanded the matter for further consideration and clarification. *Kovacs* v. *Brewer*, 356 U.S. 604 (1958); *Minnesota* v. *National Tea Co.*, 309 U.S. 551 (1940). In the alternative, the Court may continue the case for such time as will enable counsel to apply to the state court for amplification, amendment or certificate, so that the basis for its judgment may be made plain. *Department of Mental Hygiene* v. *Kirchner*, 380 U.S. 194 (1965); *Lynum* v. *Illinois*, 368 U.S. 908 (1961), 372 U.S. 528 (1963); *Hammerstein* v. *Superior Court*, 340 U.S. 622 (1951), 341 U.S. 491 (1951); *Herb* v. *Pitcairn*, 324 U.S. 117 (1945).

Even assuming that the cited state grounds may arguably support the state court's decision, whether those grounds can stand independently is a separate question. In view of the fact that the state court sustained the Commission's action and the federal due process issue was clearly raised, that court, by definition, had to decide that issue against Appalachian. The Supreme Court must, therefore, decide whether the federal constitutional issue is substantial enough so that no non-federal ground could stand alone as the basis for the state court's decision. This is precisely the question to which Appalachian's Jurisdictional Statement is directed. Thus the Commission's argument that the state court's decision was based upon adequate non-federal grounds reduces itself to the basic issue of the substantiality of the federal question.

In *Davis* v. *Wechsler*, 263 U.S. 22 (1923) the Court said:

> "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, where plainly and reasonably made, is not to be defeated under the name of local practice . . . [I]t is necessary to see that local practice shall not be allowed to put unreasonable obstacles in the way." 263 U.S. 22, at 24-25.

Were the Commission's argument on this point sustained, it could defeat almost any Supreme Court review of a Commission order merely by citing these broad regulatory

statutes which conceivably could sustain, by inference, almost any action of the Commission. This is especially dangerous in a case where the state court's opinion is completely silent as to the grounds for its decision. The Court long ago expressed its concern about defeating its review merely by raising a non-federal ground, however erroneous, and then suggesting that the state court may have based its decision thereon. *Nielson* v. *Lagow,* 53 U.S. 98, 110 (1851).

Appalachian submits that, under no circumstances, should the non-federal grounds cited be considered adequate to support the Supreme Court of Appeals' decision that the procedure followed by the Commission was lawful.

II.

The Order of March 6, 1975 Was Handed Down Without Providing Appalachian Notice Or Opportunity To Be Heard.

Appellee takes the position that Appalachian was afforded notice and a full evidentiary hearing on the matter in question (Motion to Dismiss or Affirm, pp. 10-11).

Appellee understandably does not stress the fact that the Commission's order was dated one day before the "full evidentiary" hearing was held. Nor does Appellee point out that Mr. Vaughan, Appalachian's witness at the "hearing", came prepared to testify on an entirely different matter as he explained at Tr. 28-30. The reason Mr. Vaughan came prepared to testify on a different matter was that he had no idea the Commission would consider the October 1, 1974 service practice change, because Appalachian was never so notified.

The Commission takes the position that because Mr. Vaughan was questioned before the order was handed

down, Appalachian cannot complain that it had no notice. Chairman Smith of the Commission asked Mr. Vaughan whether the letter he sent the Commission contained the basis upon which Appalachian relied when it changed its service practice. That letter made reference only to the change which was to be implemented on February 10, 1975 and not the change which already had been implemented as of October 1, 1974. When Mr. Vaughan answered "yes" the pre-dated order, which dealt with both the October 1, 1974 change and the February 10, 1975 change, was then handed down. In following this procedure, the Commission must have established an unenviable record of reducing notice and opportunity to be heard in a manner now claimed sufficient to satisfy due process into two pages of transcript dealing with a matter unrelated to the subject of this appeal.

III.

Appellee's Contention That Appalachian Failed To Exhaust Its Administrative Remedies Is Inapposite.

The Commission argues that because Appalachian did not provide the Commission with notice of its October 1, 1974 change in its service entrance cable policy, "Appalachian cannot complain that it did not have notice of Commission cognizance of the change" (Motion to Dismiss or Affirm, p. 10). Appalachian was not required to notify the Commission of such change. Appalachian's tariff, which was filed with and approved by the Commission, plainly afforded Appalachian the option of whether or not to absorb the service entrance cable costs. Upon approving this tariff, the Commission was clearly allowing Appalachian the privilege of changing its policy when it desired. Ever since it approved that tariff, the Commission was on notice that Appalachian might change its policy in accord-

ance with the precise language of the tariff. Because Appalachian was not required to notify the Commission of its change by definition, it was not required to apply to the Commission for authority to do so.* On this basis, the Commission's pallid contention that Appalachian has failed to exhaust its administrative remedies must be rejected out of hand.

* Appellee cites the West Virginia Code, Chapter 24, Article 3, Section 1 in support of its argument. That section provides that no public utility shall discontinue any *facility* without first obtaining authority from the Commission and is inapplicable on its face to the case at bar because Appalachian did not discontinue any facilities but merely changed its service practice of charging for certain facilities. Nor is the case of *Norfolk & Western Ry. Co.* v. *Public Service Commission* 91 W. Va. 414 (1922) apposite here. In that case the court made it clear that the Commission's order eliminating a grade crossing was preceded by notice, opportunity to be heard and findings of fact.

Conclusion

Appalachian reiterates that the gravity of the claim in this case is apparent. It involves traditional concepts of constitutional law and the necessary safeguards for fair and open administrative procedures. The matter is of great public importance and requires plenary consideration by the Court.

Respectfully submitted,

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